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17
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

21 ALASDAIR TURNER, individually and on
 behalf of all others similarly situated,

Case No. 5:20-cv-07495-EJD

22 **JOINT STATEMENT AND ~~[PROPOSED]~~
 ORDER**

23 Plaintiff,

Judge: Honorable Edward J. Davila
 Dept: Courtroom 4 – 5th Floor

24 v.
 25 APPLE INC., a California corporation,

Second Amended Complaint Filed: Mar. 10, 2022

26 Defendant.

1 The Parties to this case submit this Joint Statement pursuant to the Court's August 30,
 2 2024 Order (ECF No. 126) to meet and confer regarding the deadlines for a revised case
 3 schedule. On September 5, 2024, the Parties met and conferred via videoconference.

4 **Mediation Deadline**

5 At their conference, the Parties agreed it will be most productive to schedule a mediation
 6 at a time when both parties believe they are adequately prepared for a productive mediation.
 7 Plaintiff explained their position that a mediation would be more likely to bear fruit once
 8 Defendant substantively responds to Plaintiff's second set of Requests for Production and first
 9 set of Interrogatories, which implicate damages, and the Parties meet and confer on any
 10 remaining damages-related disputes. Apple explained it does not agree that Plaintiff has any
 11 damages nor that Apple's responses to Plaintiff's pending discovery requests will be relevant to
 12 Plaintiff's damages model. Nonetheless, the Parties agree to and propose providing an update on
 13 proposed mediation timing to the Court within one month from the entry of this joint statement.

14 **Remaining Deadlines**

15 The Parties disagree as to the remaining event deadlines. The Parties outline their
 16 respective proposed deadlines and positions below.

Event	Previous Deadline	Defendant's Proposal	Plaintiff's Proposal
Last day to file discovery disputes connected to class certification	N/A	N/A	December 13, 2024
Plaintiff's motion for class certification (including expert reports)	July 1, 2024	September 27, 2024	January 17, 2025
Apple's opposition to motion for class certification (including expert reports)	September 30, 2024	January 10, 2025	March 14, 2025
Plaintiff's reply in support of class certification (including expert reports)	November 12, 2024	February 21, 2025	May 16, 2025
Hearing on motion for class certification	December 12, 2024	March 20, 2025	June 19, 2025
Close of fact discovery	December 23, 2024	March 31, 2025	July 1, 2025
Joint trial setting conference statement	January 3, 2025	April 10, 2025	July 11, 2025
Trial setting conference	January 16, 2025	April 24, 2025	July 24, 2025

1 **Plaintiff's Position**

2 Plaintiff proposes filing his class certification motion in four months, on January 17,
 3 2025, and adding a deadline of December 13, 2024 to file any remaining discovery disputes
 4 connected to that motion. Apple's proposed deadline for class certification of September 27,
 5 2024—just two weeks from today—is unworkable because it would preclude Plaintiff from
 6 obtaining key discovery to support his motion, and would reward Apple for withholding key
 7 document productions in the hope of running out the clock before class certification.

8 Plaintiff's proposed deadlines serve two important goals.

9 *First*, a December 13, 2024 discovery dispute deadline would provide both the Parties
 10 and the Court with certainty and clarity, ultimately reducing resources expended for all involved.
 11 For example, following Apple's March, April, and May 2024 productions—its only productions
 12 directly responsive to Plaintiff's first set of Requests for Productions to date—Plaintiff learned
 13 novel information and gained a more robust understanding of Apple's actions that led to Apple's
 14 alleged consumption of the putative class's cellular data. This understanding informed Plaintiff's
 15 Second Set of Requests for Production and First Set of Interrogatories served on July 20.
 16 However, Apple declined to respond substantively or produce any documents in response and
 17 said it would do so only after the Court's recent order issued. This tactic required significant
 18 resources to address—letter-writing, meeting and conferring regarding the scope of Apple's
 19 immovability, strategizing to advance those conferences, and briefing a motion to stay that the
 20 Court ultimately never entered and denied as moot. Yet as of this filing, Plaintiff is still awaiting
 21 responses to these July requests. Plaintiff's attempts to schedule depositions with Apple
 22 employees, selected after review of Apple's 2024 productions, met a similar fate. Despite
 23 Apple's delay, Apple has assured Plaintiff he will—at long last—receive substantive written
 24 discovery responses in the coming days. And Plaintiff hopes that, now that the Court has ruled
 25 on the recent batch of motions, Apple will produce responsive documents within the next few
 26 weeks and cooperate on scheduling depositions. Assuming continued cooperation, a December
 27 13, 2024 deadline to raise any outstanding discovery disputes with the Court would give Plaintiff
 28

1 two months to review Apple’s discovery responses and documents, take necessary depositions,
 2 and present any remaining discovery disputes to the Court.

3 Second, a January 17, 2025 deadline to file a motion for class certification would allow
 4 Plaintiff to incorporate Apple’s forthcoming discovery and present common proof in a clear and
 5 orderly fashion. For example, Plaintiff has long attempted to augment damages-related data he
 6 received from cellular carriers with corresponding information specific to Apple. Apple only
 7 began producing such information in 2024, after which Plaintiff promptly propounded discovery
 8 requests following up on that new information. Plaintiff intends to present at class certification a
 9 damages model or models that will “provide common answers.” *Lytle v. Nutramax Labs., Inc.*, --
 10 - F.4th ---, 2024 WL 3915361, at *13 n.8 (9th Cir. 2024). But Plaintiff deserves a fair
 11 opportunity to develop and present such a model, including receiving and probing the
 12 information Plaintiff has requested but not yet received, and then working with experts as needed
 13 upon receiving that information. *See id.* at *13 n.7. And Apple acknowledges as much—just as
 14 mediation requires providing Plaintiff some transparency into information undergirding
 15 damages, so, too, does briefing class certification.

16 To the extent Apple argues that Plaintiff lost his opportunity to propose a class
 17 certification deadline more than two weeks from today, Plaintiff has long maintained that, given
 18 Apple’s discovery delays, he would need more time than Apple would stipulate to. *See Decl. of*
 19 *David M. Berger ISO Motion to Enlarge Time*, Dkt. No. 91-1, ¶¶ 24-27, 30-31. Discovery was
 20 never bifurcated and is still ongoing until December 23, 2024 even under the current schedule. In
 21 fact, Plaintiff’s new proposed deadline for filing class certification is just less than a month after
 22 this current fact discovery deadline. Plaintiff appreciates this opportunity to assess anew the class
 23 certification briefing schedule and is willing to provide any additional information the Court may
 24 find helpful.

25 **Apple’s Position**

26 This case has been pending for four years, and Plaintiff’s operative Second Amended
 27 Complaint has been pending for two and a half. Plaintiff has had a fair and fulsome opportunity
 28 to obtain the discovery he needs to file for certification, and already introduced additional undue

1 delay by unsuccessfully moving for leave to amend his SAC. The time for Plaintiff to move to
 2 certify a class, if he still intends to, is overdue.

3 **Apple's Proposal is Appropriate Given Plaintiff's Long-Pending Complaint and the**
History of This Case.

5 Plaintiff was only 17 days away from his deadline to move for class certification when he
 6 abruptly diverted this case from moving forward by filing a motion seeking leave to file a third
 7 amended complaint. (ECF No. 89). That request was denied. (ECF No. 126). In light of this
 8 pre-existing case schedule, Plaintiff has already had every opportunity to seek any discovery he
 9 believed necessary well ahead of his original July 1, 2024 deadline to move for class
 10 certification. Plaintiff's unsupported assertion that Apple has "withheld" documents is baseless;
 11 to the contrary, Apple met its May 20, 2024 deadline to substantially complete document
 12 production as to all pending requests.¹ Any failure to timely obtain the information Plaintiff
 13 feels necessary to file for certification—including the failure to depose any Apple witnesses or
 14 timely propound additional written discovery—is the fault of no one but Plaintiff himself. Apple
 15 should not be prejudiced for the choices Plaintiff has made. Any additional discovery Plaintiff
 16 seeks at this time should be pursued parallel to the class certification briefing.

17 Accordingly, as reflected in Apple's proposed case schedule, Plaintiff should be required
 18 to move to certify a class in relatively short order. This is in accord with Rule 23(c)(1)'s
 19 directive that "At an early practicable time after a person sues or is sued as a class representative,
 20 the court must determine by order whether to certify the action as a class action." Additionally,
 21 Apple's proposed schedule is appropriate because it preserves the intervals (with moderate
 22 adjustments to reflect newly intervening holidays) previously agreed to by the parties for each
 23 deadline.

25 **Plaintiff's Schedule is Unjustifiable.**

26 Plaintiff's new position that he should be entitled to further class discovery, and six

27
 28¹ Plaintiff also continues to baselessly assert that Apple's extensive Radar production from 2023,
 consisting of over 13,000 pages, was not "directly responsive" to his first set of RFPs.

1 months to obtain it, is wholly unsupportable and should not be countenanced. In his proposal,
 2 Plaintiff asks the Court to enter nearly the exact extension of time he sought in his motion to
 3 enlarge time filed concurrently with his unsuccessful motion for leave (the only change is to
 4 shorten the time Apple would have to oppose Plaintiff's motion for class certification and expand
 5 the time Plaintiff would have to reply to Apple's opposition). But Plaintiff cannot explain why
 6 any of the discovery that he still seeks from Apple justifies the case schedule he proposes, much
 7 less establish that he is entitled to it when he failed to seek this discovery in a timely fashion
 8 during the over four years this case has been pending.

9 Apple's responses to Plaintiff's First Set of Interrogatories and Second Set of Requests
 10 for Production were not due until over two weeks past Plaintiff's original July 1 class
 11 certification deadline. It is thus not credible for Plaintiff to claim that he requires or is entitled to
 12 responses to these discovery requests prior to moving for class certification.

13 Additionally, Plaintiff claims (above and during the Parties' meet and confer) that
 14 responses to the subset of these discovery requests that seek information about users with limited
 15 data plans are relevant to class certification because they relate to his damages model. But as
 16 Apple has proactively explained to Plaintiff, Apple does not maintain that information—cellular
 17 data plan carriers do. Plaintiff has long known this, and in fact served third party subpoenas on
 18 AT&T, Verizon, and T-Mobile nearly **two years ago** in November 2022. If Plaintiff failed to
 19 diligently pursue that third party discovery, that is not due to any action by Apple, and it
 20 certainly does not justify extending the case schedule by six months. *The only damages-related*
 21 *requests Plaintiff has served on Apple seek information broken down by users with limited plans*
 22 *—information that Apple does not have*—and Plaintiff has no support for his assertion that he seeks
 23 to “augment” discovery from carriers with “information specific to Apple.” The majority of
 24 Plaintiff's remaining requests seek information that would only have been relevant to the
 25 allegations Plaintiff sought to add in proposed third amended complaint, which was denied. And
 26 Plaintiff can point to no request that he could not have propounded earlier, such that he could
 27 have obtained responses prior to his original July 1 deadline. These discovery requests
 28 accordingly provide no reason to enter Plaintiff's requested schedule.

1 Plaintiff also recently requested deposition dates for two Apple software engineers in
 2 their individual capacities. Plaintiff has been on notice of one of these witnesses for over three
 3 years, as he was included in Apple's March 15, 2021 Initial Disclosures. Plaintiff has been
 4 aware of the other witness for at least one year based on his inclusion on documents produced by
 5 Apple in August 2023. Plaintiff thus could have, but did not, seek these depositions prior to his
 6 previous July 1 deadline. He has not and cannot justify why he should be permitted additional
 7 time—much less six full months—to do so now.

8 To the extent Plaintiff attempts to avoid his failure to timely obtain discovery by placing
 9 the blame on purported delay by Apple, there is no basis to do so. First, Apple did not seek a
 10 stay until after Plaintiff's original class certification deadline had passed, and moreover
 11 continued to confer with Plaintiff about discovery throughout the pendency of its request.
 12 Second, if Plaintiff believed that any of Apple's conduct during the four years this case has been
 13 pending would have prevented him from meeting his July 1 class certification deadline, he had
 14 every opportunity to seek relief from the Court prior to that. His choice not to do so does not
 15 justify extending this case by another half of a year.

16 ***

17 For these reasons, Apple respectfully requests that the Court enter its proposed schedule in its
 18 entirety.

19
 20 Dated: September 13, 2024

Respectfully submitted,

21
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13 Dated: September 13, 2024

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ATTESTATION

I attest that for all conformed signatures indicated by an “/s/,” the signatory has concurred in the filing of this document.

September 13, 2024

Respectfully submitted,

/s/ Amanda M. Karl

~~[PROPOSED]~~ ORDER

Pursuant to the Parties' agreement, the Parties shall enter a joint statement one month from the entry of this order concerning progress on negotiating a mediation deadline.

Having considered the Parties' positions, the Court adopts the following deadlines for all other events:

Event	Previous Deadline	Court-Ordered Deadline
Last day to file discovery disputes connected to class certification	N/A	October 11, 2024
Plaintiff's motion for class certification (including expert reports)	July 1, 2024	November 8, 2024
Apple's opposition to motion for class certification (including expert reports)	September 30, 2024	January 10, 2025
Plaintiff's reply in support of class certification (including expert reports)	November 12, 2024	February 21, 2025
Hearing on motion for class certification	December 12, 2024	March 20, 2025 at 9:00 a.m.
Close of fact discovery	December 23, 2024	March 31, 2025
Joint trial setting conference statement	January 3, 2025	April 10, 2025
Trial setting conference	January 16, 2025	April 24, 2025 at 11:00 a.m.

IT IS SO ORDERED.

Dated: September 16, 2024



EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE